SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 538

ANTHONY CAMPISI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Anthony Campisi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case as further described *infra*.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed in the Appendix to the Petition in No. 383 (October Term, 1962) to which this Petition is companion,* is reported in 306 F. 2d 308.

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* This petition and the one in No. 383 (*Coppolla and Sanantonio* v. *United States*) arise from the same criminal indictment, trial and conviction. The same counsel represents the respective petitioners in both this proceeding and in No. 383. Counsel trusts that duplicative printing of the opinion below as an appendix to this petition is not necessary.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (printed in Appendix to Petition in No. 383). Subsequent motion proceedings in the Court of Appeals on behalf of the instant petitioner resulted in an order by that Court on September 19, 1962, recalling its mandate,* and resulted also in affording petitioner an opportunity to submit for that Court's consideration a petition for rehearing. A petition for rehearing was then filed in the Court of Appeals on October 1, 1962,** was entertained by that Court, and was denied by it on the merits on October 3, 1962 (Appendix D, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. In a prosecution for substantive offenses and conspiracy to violate 18 U.S.C. §495 by aiding and abetting the forging and uttering of stolen United States Government Bonds, upon an indictment drawn in 538 substantive counts and two conspiracy counts (involving separate conspiracies), the extraordinary number of counts being justified by the Government solely on the basis of the number of individual bonds allegedly forged and uttered, is such indictment abortive and insufficient on its face to charge an offense on the ground of violation of petitioner's right to due process of law?

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* The motion papers and the order recalling the mandate are in the certified original record filed herewith.

** Nine extra copies of the printed petition for rehearing are filed herewith.

2. Where the proofs under such indictment ultimately establish (ostensibly) only seventeen substantive offenses (and no conspiracy offense) involving petitioner, but where petitioner has been obliged to stand trial under the full indictment with all of its 540 Counts, and where despite the elimination of the more than five hundred other counts as to petitioner the jury is still permitted to consider all of the evidence introduced in the entire case in passing on the minuscule remainder of counts, is not the due process aggrievement referred to in question No. 1, above, intensified?

3. In the circumstances recited in the two preceding questions, was it not error to decline to entertain defense motions addressed to the prodigious scope of the indictment as having been waived by reason of untimeliness under F.R.Cr.P., Rule12; and in any event should not the right of severance have been preserved continuingly once the conspiracy counts were dismissed?

4. Was it error to instruct the jury that the alleged accomplice witness Bartkofsky, the sole inculpating witness against petitioner, was, in effect, an accomplice as a matter of law? (Not argued in this petition but preserved in the event of the granting of certiorari.)

5. The case being one where the uncorroborated testimony of an alleged accomplice witness was the sole inculpating testimony against petitioner, should the prevailing federal rule dispensing with the requirement of corroboration of an accomplice witness be reconsidered and abandoned? (Not argued in this petition but preserved in the event of the granting of certiorari.)

Constitutional Provisions, Statutes and Rules Involved

The case involves the Fifth Amendment of the Constitution of the United States (due process of law); 18 U.S.C. §495; 18 U.S.C. §2; 18 U.S.C. §371; F.R. Cr.P., Rules 8, 12 and 14. These provisions are printed in the Appendix to the companion Petition in No. 383, October Term, 1962.

Statement of the Case

Petitioner was convicted in the District Court, after a jury trial, under 34 Counts of a five hundred and forty count indictment which charged conspiracy and aiding and abetting the forging and uttering of stolen United States Government Bonds in violation of 18 U.S.C. §495 (and see 18 U.S.C. §2). These 34 conviction counts, in turn, represented merely a doubling of 17 forging counts to which were added the respective 17 corresponding uttering counts; in fact, even these 17 alleged situations are actually reducible to three or perhaps four specific incidents of alleged forging (*infra*). The five hundred and forty count indictment is printed at D9a-63a.[1] The judgment of conviction was not printed for the Court below; it appears in the certified copy of the transcript of record before the Court below which was filed with the Petition in No. 383. Petitioner was sentenced to eight years on each count, to run concurrently. Petitioner

[1] "D a" refers to the "Appendix to Appellants' Briefs" (printed) in the Court below, nine copies of which were filed with the companion Petition in No. 383. References herein to "Tr. " are to the typewritten stenographic minutes of the trial in the record on appeal (likewise filed in No. 383), the pagination used herein being the original stenographer's pagination. References to " a" herein, i.e., without any prefixed alphabetical designation, are to the printed "Appendix for United States of America" in the Court below, nine copies of which were filed with the Petition in No. 383.

appealed to the Court of Appeals from the judgment of conviction. The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction (Appendix B, *infra*).

The opinion of the Court of Appeals affirming the judgment of conviction (see appendix to the companion petition in No. 383) stated that the Court was not reaching the merits of questions raised by the instant petitioner and certain other defendants addressed to the length of the indictment, propriety of the joinder of defendants and offenses, and the denial by the Trial Court of motions to sever. These questions were not being reached, the Court of Appeals stated, because it held that the objections were waived in the Trial Court.

The opinion of the Court of Appeals also did not discuss the remarkable statistical actualities of this trial whereby this 540 Count indictment was washed down to a tiny fraction of that entire number of Counts when the time finally arrived for submission of the case against petitioner Campisi to the jury. This washing down of the prodigious original number of counts did not occur, moreover, as we show in detail *infra*, until after the entire mass of "evidence" relating to the entire 540 Counts had been spread before the jury; indeed all of this evidence was permitted to remain for consideration by the jury even after all but a very small number of the counts had been dismissed by the Trial Court.

The statistics to which we refer, as to the way in which the 540 Counts were ultimately washed down to a tiny percentage of the original total, are as follows, as affects petitioner Campisi:

The original 540 Counts consisted of 538 substantive Counts and two conspiracy Counts. Of these 538 substantive Counts, petitioner Campisi in the first place was never even named in 404 of them. Campisi was originally named only in Counts 405 through 471 (forgery) and Counts 472 through 538 (the corresponding uttering Counts). Since the use of separate Counts for the alleged forgeries and utterings worked a mere arithmetical doubling of the actual alleged offenses, it may be taken for the purposes of the present discussion that Campisi was originally named in 67 substantive counts. Of the two conspiracy counts, Campisi was named in only one of them (Count 540).

Of the 67 (or 134) original substantive Counts against Campisi, the only ones finally submitted to the jury were 17 forgery Counts plus the 17 corresponding uttering Counts (Counts 455 through 471, and Counts 527 through 538, respectively) (Tr. 1003). We shall show *infra* that even as to these 17 (or 34) Counts which were sent to the jury, five of them (forgery), or ten (to include the uttering Counts), should absolutely have been dismissed by the Court for failure of proof (Counts 458 through 462 and Counts 525 through 529, respectively). Thus, at most, the Government's "case" against Campisi actually never involved more than 12 (or 24, if such 12 Counts are doubled) Counts, as to which Campisi was obliged to stand trial under an indictment naming numerous other defendants and charging 538 substantive offenses. And, even as to these 12 Counts, the actual alleged forgery-uttering incidents involved were comprised of only three or perhaps four distinct transactions (see the tabular indictment breakdown of Counts 455 through 457, and 463 through 471, in the appellants' printed Appendix in the Court below, pp. D52a-54a).

It is thus not unfair to say that Campisi had to stand trial under an indictment containing 538 substantive Counts, on what ultimately turned out to be, in actuality, three or perhaps four distinct alleged offenses.

As for the conspiracy Count naming Campisi (Count 540), this was dismissed by the Trial Court. We shall show *infra* that the Court below apparently did not take into consideration certain persuasive record indications (to which we shall refer) that the conspiracy Counts were dismissed by the Trial Court not merely for simplification, as the Court below apparently thought, but because the proof as to those Counts was deemed by the Trial Court to be unsatisfactory.

Before presenting the further details as to the ways in which petitioner Campisi was prejudiced by the denial of a severance under this prodigious indictment, we pause to note the circumstances of the defense motions in the District Court for relief addressed to the joinder aspects of the indictment and its extraordinary scope. This portion of the trial proceedings is printed in full in the Government's appendix in the Court below at pp. 2a to 10a. It is true, as the Court below noted in its opinion, that counsel for one of the other defendants (Mr. Direnzo, representing defendant Sanantonio) acknowledged to the District Court that the Court "would be perfectly justified" in denying the motion for severance—which was being made for the first time on the morning of the commencement of the trial, January 2, 1962—on the ground that the application was not timely (*id.*, 2a-3a). However Mr. Direnzo qualified this concession by stating also to the District Court that denial of the motion for untimeliness would be justified "in the for-

mal course of events" (*id.* 2a). In other words, Mr. Direnzo was requesting the Court to consider the extraordinary circumstances presented, and not to treat the motion for severance in an ordinary manner as regards the issue of timeliness. Furthermore, when it came time for counsel for the instant petitioner Campisi to present his own motion for severance, there was not even any such qualified concession as we have just described *per* Mr. Direnzo. Campisi's attorney, Mr. Bozza, addressed the Trial Court at *id.* 7a-9a; this, as noted, was on the morning of January 2, 1962. Mr. Bozza informed the Court that Campisi had not been brought into the case until the unsealing of a superseding indictment (which was late in November, 1961—see Appellants' printed Appendix (filed with the companion petition in No. 383), Docket entries, at D1a; that he (Mr. Bozza) had been almost continuously engaged in another trial from shortly after the time of Campisi's arrest until shortly before the Christmas holidays; that on December 27, 1961 he (Mr. Bozza) had made known to the District Court that he was not prepared to proceed with the trial because of the press of his then recently concluded other engagements and that the Judge on that occasion had instructed Mr. Bozza to make his application to the Judge who should be assigned to the trial; and that denial of a severance in view of the enormous scope of the indictment would intensify the difficulties faced by the Campisi defense in being required to proceed to trial with all of the other defendants under the entire indictment. See Government's Appendix in the Court below, pp. 7a-9a.

Thus, Campisi's counsel in the Trial Court not only made no concession, qualified or otherwise, on the issue of untimeliness, but he vigorously urged the justness of granting a

postponement and a severance to Campisi on grounds distinctly applicable to that defendant. While the opinion of the Court of Appeals did note (with seeming reference to Campisi) that the District Judge was informed of counsel's press of other engagements and of the failure of predecessor counsel to make a timely motion, the opinion apparently did not take into account the fact that Campisi had not even been brought into this case until nearly the end of November, 1961, which places the matter in a light more favorable to Campisi. It should also be noted that the District Judge who at that time (late Nov. 1961) was assigned to the matter had set a date for the making of motions which came very crowdedly soon thereafter (December 4, 1961), at which time Mr. Bozza, who as seen had just entered the case, was unavoidably occupied with prior tasks in the other case above mentioned.

We turn now to the details of the trial proof herein:

First, of the three accomplice witnesses upon whom the Government relied to prove both the substantive and conspiracy counts, two of them, Levine and Parks, did not inculpate petitioner Campisi in any way. Levine's only mention of Campisi was that he had met him in the course of gambling activities (no date given) (Tr. 186). In fact, at Tr. 377 Levine specifically stated that in all the activities to which he had testified he never had any "conversations, transactions or dealings whatsoever with Anthony Campisi". Nor had Levine ever met the third accomplice witness, Bartkofsky, whom the Government sought to link with Campisi (Tr. 315). Also, the prosecutor stated for the record that nothing connected with the testimony of Levine and Parks was being offered with respect to Campisi (Tr. 210); compare also the prosecutor's statements at Tr. 203-

205, declaring that exhibits offered in connection with Levine did not relate to Campisi. Again, when the accomplice witness Parks testified (Tr. 409-464) there was not one word about Campisi. All of this testimony by Levine and Parks, and the collateral testimony relating to the transactions in which those two accomplice witnesses allegedly participated, accounted for 334 of the 538 substantive Counts, which had nothing to do with Campisi but which were brandished before the jury *viz* this astounding use of the Government's right of "joinder".

Second, there were an additional 70 substantive counts which likewise had nothing to do with Campisi, *viz.*, Counts 335 through 404, which involved only the defendants Bartkofsky and Donatiello.

Third, and still more striking, even the Counts which supposedly were to be shown to involve Campisi, *viz.*, Counts 405 through 538, turned out to be almost entirely composed of sound and fury, as we earlier intimated. These latter 134 substantive Counts washed out at the trial as follows:

One hundred of these 134 Counts were dismissed by the Trial Judge as relating not to Campisi but to another defendant, Donatiello (forgery counts 405 through 454, and uttering Counts 472 through 521). See Tr. 799-803, 807, 868, 1003.

After the elimination of the above mentioned 100 Counts against Campisi, there remained in the case against him, as earlier mentioned, 17 forgery plus 17 uttering Counts (Numbers 455 through 471, and 527 through 538, respectively) (Tr. 1003). However, of these 17 (or 34) Counts, there were 5 forgery and 5 uttering Counts which should plainly

have been dismissed by the Trial Court just as had been the 100 Counts above mentioned. These last mentioned 5 (or 10) Counts were numbers 458 through 462, and 525 through 529, relating to the so called LaCorte bonds. Bartkofsky himself had testified that as to these LaCorte bonds he could not remember at all whether he had cashed them for Campisi, and he expressly stated on the witness stand that he wanted to "leave them out" (Tr. 733-734; see also Tr. 776-777). The Trial Court had apparently overlooked or failed to recall accurately this testimony of Bartkofsky concerning the LaCorte bonds.

Even more seriously prejudicial to Campisi's chance for a fair trial of the distinct issue of his own guilt or innocence under this remarkable indictment, were the circumstances which developed at the trial in connection with the two conspiracy counts (numbers 539 and 540). Campisi was named only under the second of these conspiracy counts (number 540). Ultimately, the Trial Court dismissed both of the conspiracy counts (Tr. 1002-1003). The Court of Appeals said, "The conspiracy Counts were amply proved and were dismissed only to simplify the issues". But it was precisely in connection with these conspiracy counts, and the Government's efforts at "proof" thereof, that the Trial Court most vigorously and repeatedly expressed its exasperation over the hopelessly confused development of those "proofs". Thus, rather early in the trial, in connection with the so called "Marron" bonds, the prosecutor offered those bonds on both conspiracy counts, but in the course of colloquy, the Court became convinced that they could not be received in evidence against Campisi under the conspiracy count in which he was named (Count 540). See Tr. 490-493. Similarly, during the testimony of the

accomplice witness Bartkofsky, the Court was obliged to reject the prosecutor's efforts to "prove" an alleged conspiratorial linkage affecting Campisi in connection with certain alleged transactions in New Jersey, the Court remarking that the conspiracy had not yet been proved (Tr. 627); and at Tr. 640 the prosecutor apparently himself agreed to drop this phase of the case against Campisi—this episode involving Bartkofsky and the alleged New Jersey transactions appears at Tr. 617-640.

Similarly, but even more profoundly confusing, the Government's efforts to prove the conspiracy count against Campisi in connection with certain alleged happenings in Middletown, New York should be noted. See Tr. 635-648, where (especially at Tr. 646 et seq.), the Trial Court's exasperation reached probably its highest point during the entire trial over the Government's confusing use of the conspiracy "proofs".

But the worst confusion of all in connection with the conspiracy phase of the case occurred in connection with the so called Fankuchen bonds which the prosecutor attempted to connect with Campisi on the conspiracy count (No. 540). This "Fankuchen" phase appears at Tr. 651-671. At the end of this portion of the testimony concerning the "Fankuchen" bonds the Trial Court was prompted to remark, in ruling upon a motion by one of the other defendants to strike the testimony, that "I don't know what you are worried about. He [the prosecutor] didn't seem to get anywhere" (Tr. 671).

During the extended colloquy which occurred subsequently upon the motion to dismiss at the end of the Government's case, the Trial Court repeatedly expressed its

dissatisfaction with the conspiracy phase of the case, and we respectfully submit that nowhere in the record did the Trial Court manifest its belief that the conspiracy Counts had been proved. See Tr. 797-868.

Notwithstanding the District Court's dismissal of all but a small fraction of the substantive counts, and its dismissal of both of the conspiracy counts, and notwithstanding the Court's express ruling prior to the summations that "I take it that all counsel will argue on only the Counts that are still in the indictment" (Tr. 870), the Court subsequently made rulings whose necessary effect was that the jury would be permitted to consider all of the evidence which had been introduced by the Government on all of the original 540 Counts of the indictment, over the vigorous objection of the defense (Tr. 1129-1130, Tr. 1158, Tr. 1197).

Thanks to the leaving in of all of this evidence which had been received under the dismissed Counts, the jury case against the petitioner Campisi was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a "ring" with which the evidence under the relevant remaining Counts against Campisi did not actually link him in any way except in regard to the few Bartkofsky transactions to which we have above referred.

For a case which, when washed down to its ultimate maximum proportions as to Campisi, ended up involving not more than three or four actual distinct alleged transactions, the Government blazoned its way, from the Grand Jury stage onward and down through the trial jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts,

which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs, see, e.g., in the Government's printed Appendix, 205a-213a, 237a-238a; see also Tr. 667-668, 813-814, 845-847, 1148-1149; and see, in appellant's Appendix, D158a, 160a-161a. Even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against this petitioner did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

Reasons for Granting the Writ

1. As in the companion petition in No. 383 at this Term, the instant petition submits as its primary reason for granting the writ that, in their overall impingement upon the rights of the petitioner, the prosecutive devices used in this case and the failure of the Trial Court to stay the Government's hand, present a situation of outstanding importance for this Court's intercession in the interests of the fair and rational administration of federal criminal justice. The petition in No. 383 cites the numerous expressions by the District Court excoriating the Government for bringing on this "monstrosity" of an indictment (pp. 7-8,

14). Our statement of the case herein shows the manifold ways in which the trial proofs rendered it impossible for the petitioner Campisi to get a fair trial of the distinct issue of his own guilt or innocence, owing to the stupefying welter of "proofs" addressed to 540 Counts which, when washed down, left only a tiny fragment of the original number of counts as against petitioner Campisi.

Petitioner respectfully adopts the following from pp. 14-15 of the Petition in No. 383:

> "The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to surmise. Conspiracy, the "prosecutors darling", was of course to be expected here. But by the intermingling of conspiracy with aiding-and-abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the quite distinct segments of the several defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunder-buss targets only if the Courts interfered as a matter of law and procedural justice."

In view of all of the foregoing, we respectfully submit that the District Court's refusal to consider Campisi's motion for severance at the outset of the trial on the ground of untimeliness was an abuse of discretion; and that the decision of the Court of Appeals to the contrary should be reviewed by this Court in the interests of the fair administration of federal criminal justice.

While there appears to be little express authority on the point, it would seem that there exists the power to review, on the test of abuse of discretion, rulings of a District Court

declining to entertain a motion under Rule 12 on the ground of untimeliness. Cf. *Cleaver* v. *United States*, 238 F. 2d 766, 769 (C.A. 10, 1956).

But, in any event, we urge also that the points here in question partake of the quality of due process constitutionality, so that the defense motion was not one that could be waived in the manner asserted by the Trial Court and by the Court below but was in the nature of a motion addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, the decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability, in principle, of indictments of this portentously over-aweing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving factors which exist in this case. E.g., *People* v. *Allen*, 352 Ill. 262, 185 N.E. 605 (1933) (16 Counts).

2. Apart from the point above urged as to the due process aspect of the situation, the case is appropriate for certiorari on the issue of misjoinder and rights of severance on the distinct ground of the impact of the dismissal of the con-

spiracy counts. Cf. *Schaffer* v. *United States*, 362 U. S. 511, 516. As we believe was demonstrated in our Statement of the Case, it would have been a correct ruling by the Trial Court to have expressly dismissed the conspiracy count affecting Campisi (Count 540) for failure of proof. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which this Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of certiorari in this case for the sake of preserving the fair administration of federal criminal justice.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue in this case. The decision below should not be permitted to stand as a guide for future federal criminal trials.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

(Printed in appendix to companion petition in No. 383, October Term, 1962.)

APPENDIX B

Judgment of Court of Appeals

(Printed in appendix to companion petition in No. 383, October Term, 1962.)

APPENDIX C

Judgment of District Court

(Filed as part of certified transcript of record in No. 383, October Term, 1962.)

APPENDIX D

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY CAMPISI,

Petitioner-Defendant-Appellant.

PETITION FOR REHEARING

Jerome Lewis, Brooklyn, New York,
Attorney for Petitioner-
Defendant-Appellant.

Petition for rehearing denied.

H. J. F.
I. R. K.
P. R. H.
U. S. C. JJ.

October 3, 1962.

APPENDIX E

Constitutional Provisions, Statutes and Rules

(Printed in appendix to companion petition in No. 383, October Term, 1962.)